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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-379

M. J. PIROLLI & SONS, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

REPLY BRIEF TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The National Labor Relations Board in its Memorandum For The National Labor Relations Board In Opposition in the instant case attempts to answer the Petitioner's key argument that the Board and its Trial Examiner failed to analyze Petitioner's reinstatement offer in the context of their discussion of the need for issuance of a bargaining order by the following statement:

> ". . .he [the Trial Examiner] fully discussed the offer earlier in his decision, finding that the Company President had made remarks on the picket line

> that detracted from the effectiveness of the offer and that only three employees accepted it." (Res. 3)

This, in effect, is a gratuitous attempt to minimize the importance of the reinstatement offer. However, the statement is misleading because taken out of context. What the Trial Examiner actually said was:

> "The record reflects that the telegram was sent by Pirolli, Sr., in the context of some abortive settlement negotiations attempted as a result of the charges filed in this case. However, that fact, of course, does not detract from the effectiveness of the offer. What did detract from its effectiveness was the statement of Pirolli, Sr., on the picket line to the effect that the employees would not stay with the Company even if they accepted the offer. This rather ambiguous statement could be interpreted to mean that the employees would not come back or 'stay' unless they had a union. Moreover, whatever was stated on the picket line, the fact remains that three employees (Brophy, Joseph Lynch, and Bruce) did respond to the telegram and were reinstated. Another (Cleary), according to his own testimony, was offered — and declined — an offer of reinstatement by Pirolli, Sr. Anderson acknowledged the oral offer but attempted to attach conditions of his own as a prerequisite to returning to work." (A. 26, 27).[1]

The Trial Examiner went on to conclude:

> "These facts certainly confirm the good faith of the offer and tend to negate the assertions of some of the

[1] "A" refers to Appendix To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit.

employees that they were fearful of returning because of the threats made by the Pirollis on the first day of the picketing and/or the conversation between Pirolli, Sr., and Pasquale hereinabove referred to. Finally, I have considered, as was intimated by some of the testimony, that so long as the employees were picketing, none of them wanted to break the bond and cross the picket line.

Accordingly, I find and conclude that the telegram sent by the Respondent on November 25 constituted a valid and binding offer of reinstatement to the named employees and I shall not require, in any recommended Order, that Respondent make a new offer of reinstatement." (A. 27).

This finding totally vitiates Respondent's attempt to negate the impact of the offer.

2. General Counsel is also attempting to justify its conclusion that "the Examiner and the Board were reasonable in concluding that it was not possible 'to resolve the representation question through the process of an NLRB-conducted election'." (Res. 3) by attempting to perform the type of analysis of the reinstatement offer's effect on future election conditions that the Board itself should have performed. However, it is the Board's "fund of knowledge and expertise" that this Court has held must be utilized in determining appropriate remedies and performing the attendant scrutiny of relevant factors, not the knowledge or expertise of General Counsel. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575 at 612, n. 32.

This *ex post facto* attempt at retrieval must fail since the singular fact remains that neither the Trial Examiner nor the Board, as alleged in Petitioner's Petition for a Writ of Certiorari, performed their duty of consider-

ing *all* relevant factors, including the reinstatement offer, before issuance of an order to bargain. Therefore, it is respectfully submitted that the Board was not "reasonable" in concluding that a bargaining order was warranted. (Res. 3)

The petition for a writ of Certiorari should be granted.

Respectfully submitted,

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